MOTION FILED MAY 3 1963 LIBRARY SUPREME COURT, U. S.

No. [redacted]/15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

GENERAL MOTORS CORPORATION,
A CORPORATION, *Appellant*

v.

STATE OF WASHINGTON, ET AL, *Appellees*

On Appeal from the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1962

No.

GENERAL MOTORS CORPORATION, *Appellant*

v.

STATE OF WASHINGTON, ET AL, *Appellees*

On Appeal from the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, as Counsel for The National Association of Manufacturers of the United States of America, Inc., respectfully move this Honorable Court for leave to file the annexed brief *amicus curiae* in this case in support of the Jurisdictional Statement of Appellant.

1. The National Association of Manufacturers is a non-profit membership corporation organized under the laws of the State of New York.

2. The Association is composed of and financially supported by the more than 16,000 member companies engaged in manufacturing and related activities throughout the United States. A significant percentage of these association members are small business. About 83 percent employ fewer than 500 persons and nearly 50 percent have less than 100 employees.

3. Most of these member companies engage in commercial activities in interstate commerce and utilize varying forms of marketing and distribution techniques in the sale of their products.

4. The undersigned Counsel for this Association wrote to the attorneys for the parties in this case requesting their consent to file a brief *amicus curiae* in support of the Jurisdictional Statement of Appellant.

5. Counsel for General Motors Corporation, Aloysius F. Power, Esq., granted consent to the filing of such brief *amicus curiae* in a letter dated March 5, 1963.

6. The State of Washington, through an Assistant Attorney General, Timothy R. Malone, Esq., responding for its Attorney General, declined consent in a letter dated March 11, 1963.

7. This Association has an interest in this case because it involves basic constitutional issues under the Commerce and Due Process Clauses which require resolution and clarification by this Court. The decision below, if left standing, will generate confusion and uncertainty which can have a far-reaching effect on the selling and distribution techniques utilized by many members of this Association engaged in interstate commerce. This effect could be of particular consequence to our medium and small-sized members.

8. It is respectfully submitted that this case affords an appropriate occasion for the Court to grant leave to file the brief annexed hereto.

We therefore urge that leave be granted and respectfully so move the Court.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE

JURISDICTION, STATUTES INVOLVED, AND STATEMENT OF CASE

The Court's attention is respectfully invited to the Jurisdictional Statement of Appellant, in which these elements are set forth in detail for the information of the Court.

QUESTION

The basic issue presented in this case is whether the State of Washington may constitutionally levy its unapportioned business and occupation privilege franchise tax measured by gross receipts on wholesale sales in interstate commerce.

The facts of this case, as outlined by the Supreme Court of Washington in its opinion below, 376 P. 2d

893 (1962), reveal that Appellant's business activities, which are the point of contention, involve only promotional and service contacts with independent retail automobile dealers in that State which are performed by a small number of subordinate resident employees and other representatives traveling from outside of the State of Washington. The Supreme Court of Washington pointed to these limited activities and the presence of customers plus advertising "beamed in via television, exhibited by means of outdoor advertising, and distributed by way of newspapers and magazines" and held them to be "a sufficient nexus" to uphold application of the State's franchise tax on gross receipts. It should be noted that Appellant's instate activities did *not* include manufacturing or solicitation, acceptance or filling of orders, receipt of payment, delivery of goods, establishment of credit, or other similar activities.

ARGUMENT

In holding that mere performance of limited promotional and service activities plus an advertising program carried on through various communications media, constituted a "sufficient nexus" upon which to apply the Washington gross receipts tax, the Court below relied upon certain decisions of this Court. We submit that these cases were erroneously applied to the instant situation.

One of the cases relied upon by the State of Washington is the recent *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 79 S. Ct. 357 (1959), which involved the imposition of an apportioned net income tax, as distinguished from the unapportioned gross receipts tax in the instant matter. However, it is made clear in *Northwestern* that even

a net income tax, to stand the test of constitutionality, must be non-discriminatory and be properly apportioned to local activities based upon a legal nexus which can support the tax. *Northwestern* also stands for the principle that a tax cannot stand which compels a taxpayer to pay for the privilege of engaging in interstate commerce. *Northwestern* specifically noted at p. 458, "Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951)."

The State of Washington contends not only that the limited activities engaged in within the State are such that they justify taxing that which takes place within its borders, but would extend such concept to embrace all of the revenue derived from activities engaged in primarily outside the State. This premise is advanced notwithstanding that the legal incidents of sale occur out of the State and that portion which takes place in-state is *de minimis*. This Court has earlier said in *Cooney* v. *Mountain States Telephone and Telegraph Co.*, 294 U.S. 384, 392 (1935):

> "And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination."

The case of *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534 (1951), recognizes that an interstate seller can have both interstate and intrastate activities, but if such business is so commingled as to be difficult of separation, the taxpayer proceeds at his peril. In *Norton* this Court said that the taxpayer had failed to establish that certain interstate sales were dissociated from the retail store which had some contact with both

local and interstate sales. The Court below has, we submit, misapplied the doctrine of *Norton* to the instant situation by holding that it extended to General Motors sales which had no contact with any office in the State of Washington and were clearly of a class held not taxable in *Norton*. This unwarranted application of the *Norton* case rule rests on the premise that the taxpayer was required to "dissociate" its promotional activities from the taxed sales as distinguished from dissociating the activities of a local store. *Norton* tells us if there are separable and dissociated transactions, they must be recognized and the interstate seller is protected by interstate immunity. The record here and the facts as reviewed in the opinion below would clearly indicate identifiable and separable activities wholly unrelated to the taxed sales, which activities paid their own tax. To fail to recognize such factors or disregard them because of "promotional activities" is to place purely interstate business in an indefensible position.

The Court below seems to place great reliance and emphasis on the fact that Appellant engages in several forms of advertising in various media to attract potential car buyers to the place of business of independent local dealers. This concept creates a new rule of law, particularly with respect to advertising media that project on a national basis. Is advertising in a national magazine or via a nation-wide television network to expose an interstate vendor to the grip of state taxation? The Court below specifically notes that such advertising, and other promotions, "tend to strengthen dealer representation and stimulate consumer demand." Yet, in the next breath it is noted that General Motors does not participate in the ultimate retail

sale—this is done by the independent local dealer. How then can these inconsistences be reconciled by the rule of law applied here to justify imposition of this tax on identifiable and separable interstate activities? In the *Norton* case this Court recognized that an interstate vendor could operate in the local market in direct sales and be protected by and entitled to the immunity of interstate commerce. Here there is no local contact with the ultimate vendee and the immunity of interstate commerce would be nullified if the decision below stands.

CONCLUSION

This decision below with the broad ramifications and uncertainties that are bound to flow is of concern and economic consequence to interstate marketers. Such a rule of law would patently erect stateline barriers to the flow of interstate commerce and thus discriminate. We submit that the great national market that is to be protected by the immunity of interstate commerce would suffer.

The problems, both legal and economic, that have been generated by developments in the area of so-called state taxation of interstate commerce have been brought into sharp focus in recent years. Following the *Northwestern* case, *supra,* and related decisions of this Court, the Congress saw fit to enact a new law[1] which affords a limited exemption in the apportioned net income tax field.

This action by the Congress reflects its growing concern regarding the free movement of interstate commerce and the complexities of state taxation in relation to national commerce. The report[2] of the Com-

[1] Public Law 86-272, as amended.

[2] H. Rept. No. 936, p. 2, 86th Congress, 1st Session.

mittee on the Judiciary, U. S. House of Representatives, clearly stated this concern by noting:

> "Businessmen should not be forced to guess about their tax liability. Nor should they be subject to the kind of state taxation which would Balkanize the American economy."

Similarly, the Senate Committee on Finance in its report[3] to Congress stated:

> "Your committee believes that, unless some certainty is restored to this area, the economic implications for the economy of the entire nation may be unfortunate."

This concern over the economic implications of undue extensions of state taxation to the channels of interstate commerce serves to point up the substantial national issues involved in this litigation. We respectfully contend that a substantial federal question of great consequence to large numbers of interstate vendors and taxpayers has been decided erroneously by the Court below. We, therefore, urge and join with Appellant in requesting that this Court note probable jurisdiction and that the cause be fully heard, considered and determined.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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[3] S. Rept. No. 658, p. 4, 86th Congress, 1st Session.